STATE OF MICHIGAN

COURT OF APPEALS

CHELSEA M. KIMBALL, Plaintiff-Appellant,	UNPUBLISHED August 12, 2014
v	No. 320139 Houghton Circuit Court
BRIAN R. CROWLEY, Defendant-Appellee.	LC No. 2013-015549-DC

Before: M. J. KELLY, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

In this child custody dispute, pursuant to a stipulation by the parties, the trial court entered an order awarding plaintiff and defendant joint legal and physical custody of their two minor children. Plaintiff now appeals as of right from that order. For reasons discussed below, we vacate the judgment of the trial court and remand for a determination of the existence of an established custodial environment and independent consideration of the children's best interests by the trial court.

Plaintiff and defendant are the parents of minor children LC and EC. Plaintiff and defendant were never married, but they executed affidavits of parentage regarding both children, naming defendant as the father. The parties lived together with their children until February 2013, at which time plaintiff and the children moved in with plaintiff's mother. The parties did not have a formal custody arrangement in place after their separation, but they did informally arrange for the children to spend time with defendant.

Between May 30, 2013 and July 27, 2013, at the agreement of both parties, LC resided with defendant for an extended visit. On July 27, 2013, plaintiff attempted to retrieve LC from defendant's care and defendant refused, prompting plaintiff to seek legal redress. Plaintiff filed the current lawsuit seeking sole physical custody of the children. Plaintiff also filed a petition for an ex parte custody order, which the court granted, giving plaintiff sole physical custody of the children as of July 31, 2013 until further order of the court. Thereafter, plaintiff retrieved LC from defendant's care without incident.

On October 7, 2013, the parties entered into a "temporary stipulation" adopting the parenting-time schedule recommended by the Friend of the Court, pursuant to which the parties shared joint legal custody while plaintiff had physical custody and a holiday schedule gave defendant parenting time with the children during the summer, Thanksgiving break, Father's Day

and half of Christmas break. The parties also agreed that defendant would pay plaintiff $316 in monthly child support. On October 7, 2013, the trial court entered an order effectuating the parties' temporary stipulation.

The trial court held a custody hearing on December 9, 2013, at which both parties testified and the Friend of the Court recommended joint legal custody and physical placement with plaintiff in conjunction with a holiday schedule providing defendant with parenting time. The following day, the hearing resumed for the purpose of allowing the parties' to make closing statements and to allow the trial court to render its opinion on the custody dispute. However, before this occurred, the court afforded the parties a final opportunity to reach an agreement between themselves. Following a recess for this purpose, the parties indicated that they had reached an agreement and they placed that agreement on the record.

The agreement provided for joint legal and physical custody, and provided for a holiday schedule where plaintiff would have the children during school breaks and on certain other holidays. The parties also agreed that child support would be reserved. The trial court listened to the parties' stipulation and then stated: "[the] Court being aware of the stipulation made by the parties in open court and on the record, after considering the proofs yesterday, finds that the stipulation is appropriate and will enter that order . . . ." Thereafter, the trial court signed an order commensurate with the parties' stipulation on the record.

After the trial court entered the stipulation and order resolving the custody dispute, plaintiff filed a motion for new trial and for relief from the stipulation. In an accompanying affidavit, plaintiff asserted that her then-attorney "improperly persuaded and manipulated" her into agreeing to the stipulation by informing her that the judge was preparing to issue an adverse ruling against her and strongly suggesting that plaintiff agree to the terms of the stipulation. Plaintiff's motion asked the trial court to grant plaintiff a new trial under MCR 2.611(A)(1)(a) and relief from the order "based on pure equity" under MCR 2.612(C)(1)(f). The trial court issued a written order stating that it had considered plaintiff's motion and affidavit and found that plaintiff had "failed to establish grounds for granting the relief requested." Plaintiff now appeals as of right.

On appeal, plaintiff first argues that the stipulation entered into by the parties should be held void because plaintiff entered into the agreement under duress. Specifically, relying on her affidavit, plaintiff maintains that, on the day the stipulation was made, her attorney advised her to enter into the agreement because the trial judge had recently learned disparaging information about plaintiff from the Friend of the Court and was prepared, on the basis of this information, to rule against plaintiff.

Relevant to plaintiff's claim, absent an indication of fraud, duress, or severe stress, a stipulation between parties must be enforced according to its plain terms. *Myland v Myland*, 290 Mich App 691, 701; 804 NW2d 124 (2010). "Duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v Headley*, 45 Mich 569, 574; 8 NW 511 (1881). When a party to an agreement argues that consent was achieved "through duress or coercion practiced by her attorney, the judgment will not be set aside absent a showing that the other party

participated in the duress or coercion." *Vittiglio v Vittiglio*, 297 Mich App 391, 401-402; 824 NW2d 591 (2012).

In this case, although plaintiff's motion for a new trial and affidavit assert that plaintiff was coerced, they do not assert (and plaintiff does not now assert on appeal) that her attorney or anyone else involved did anything illegal. Plaintiff entered into the agreement on the record with full knowledge of its contents and with the advice of counsel. See *Apter v Joffo*, 32 Mich App 411, 416; 189 NW2d 7 (1971). There is nothing in the record to indicate an "unlawful act of another" supportive of duress. Moreover, plaintiff argues only that her attorney induced her agreement to the stipulation; she offers no evidence, and makes no argument, to suggest that defendant played any role in her purported duress. See *Vittiglio*, 297 Mich App at 401-402. Indeed, defendant participated in the hearing in question by telephone, and was not present in the courthouse during the events plaintiff described. On these facts, plaintiff has not made a showing of duress which would warrant the setting aside of her stipulation. *Myland*, 290 Mich App at 701.

Apart from her claim of duress, plaintiff asserts that the trial court committed clear legal error by failing to analyze the best interests factors, MCL 722.23, before making a custody determination. In particular, plaintiff asserts that she had an established custodial environment with the children, meaning that analysis of each factor was required to determine whether clear and convincing evidence existed to modify the custodial arrangement.

Under MCL 722.28, this Court "must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

The Child Custody Act, MCL 722.21 *et seq*., provides a comprehensive statutory scheme for resolving custody disputes, pursuant to which the best interests of the child control resolution of a custody dispute between parents. *Harvey v Harvey*, 470 Mich 186, 191; 680 NW2d 835 (2004). Accordingly, when resolving a child custody dispute, trial courts have an affirmative obligation to "declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time" in accordance with the Child Custody Act. *Id.* at 192, quoting MCL 722.24(1). The child's best interests are ascertained using the 12 factors outlined in MCL 722.23. *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004). Typically, the trial court is required to "explicitly state its findings and conclusions with regard to each factor." *Id.* Brief, definite, and pertinent findings and conclusions will suffice, but those findings must be supported by evidence in the record, and the failure to set forth a record amenable to appellate review requires remand for a new child custody hearing. *Foskett v Foskett*, 247 Mich App 1, 12-13; 634 NW2d 363 (2001).

It is also true, however, "that parents sometimes reach agreements regarding custody and visitation matters either informally through direct negotiations or through mediation procedures made available by dispute resolution organizations." *Harvey*, 470 Mich at 187 n 2. While such amicable resolutions are encouraged, "the deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount." *Id.* at 193. Thus, even where the parties have reached an agreement,

"[t]he trial court cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000).

Although a trial court must always make an independent best interests determination, when the parties have reached a custody agreement, it is sometimes the case that less explicit fact-finding is required by the trial court in making its best interests determination. See *Harvey*, 470 Mich at 192-193. Specifically, the Michigan Supreme Court has explained:

> [W]here the parties have agreed to a custody arrangement, [it is not required that] the court . . . conduct a hearing or otherwise engage in intensive fact-finding. See MCL 552.513(2) and 600.5080(1). Our requirement under such circumstances is that the court satisfy itself concerning the best interests of the children. When the court signs the order, it indicates that it has done so. A judge signs an order only after profound deliberation and in the exercise of the judge's traditional broad discretion. [*Id.*]

Similarly, this Court has determined that "[i]mplicit in the trial court's acceptance of the parties' custody and visitation arrangement is the court's determination that the arrangement struck by the parties is in the child's best interest." *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994). For this reason, "where the parties are in agreement regarding custody and visitation and present the court with such an agreement, the trial court need not expressly articulate each of the best interest factors." *Id.* at 192-193. See also *Dick v Dick*, 210 Mich App 576, 585; 534 NW2d 185 (1995).

In this case, although the trial court did not make express findings of fact regarding the best interest factors enumerated in MCL 722.23, the trial court did state on the record that "[the] Court being aware of the stipulation made by the parties in open court and on the record, after considering the proofs yesterday, finds that the stipulation is appropriate and will enter that order . . . ." The trial court also signed the written custody order. Given that the parties stipulated to the order in question, under *Harvey*'s rationale, and in keeping with *Koron*, we might ordinarily be inclined to hold that the trial court's remarks and signing of the order were sufficient to convey the trial court's articulation of a best interests determination, particularly given that the trial court in fact held a custody hearing the previous day.

We feel constrained to note, however, that plaintiff maintains the existence of an established custodial environment, and the trial court failed to consider whether such an environment existed. Where a custody order, be it an order modifying a previous judgment or a new order establishing custody, changes an established custodial environment there must be "clear and convincing evidence" that the change is in the best interests of the children.[1] MCL 722.27(1)(c); *Thompson*, 261 Mich App at 362. Because of this heightened standard, this Court has previously rejected the notion that a trial court need not specifically examine the best interest

[1] In comparison, in the absence of an established custodial environment, a preponderance of the evidence standard applies. *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991).

factors before changing an established custodial environment. See *Phillips*, 241 Mich App at 22-24 & n 1. See also *Spires v Bergman*, 276 Mich App 432, 442-443; 741 NW2d 523 (2007) (holding trial court erred by failing to make findings of facts regarding factors delineated in MCL 722.23 before modifying a child custody order pursuant to the parents' stipulation).

In this case, because the trial court's order altered the previous parenting arrangement, it thus becomes important whether an established custodial environment existed before the entry of the custody order at issue. The trial court failed, however, to make any findings, or even to consider, the existence of an established custodial environment, despite the fact that a temporary custody order was in place pursuant to the parties' previous stipulation under which plaintiff had physical custody of the children. This failure was a clear error of law because "a trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011). See also *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000) ("Because a temporary custody order existed, the trial court was required to make a finding regarding the issue whether an established custodial environment existed.").

Further, we view the trial court's failure to consider this question a clear legal error on a major issue. "The failure to determine whether there is an established custodial environment is not harmless because the trial court's determination regarding whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children." *Kessler*, 295 Mich App at 62. In short, before the trial court could independently assess the children's best interests, it needed to make a determination regarding the existence of an established custodial environment. Because the question whether the children had an established custodial environment with plaintiff presents a question of fact best determined by the trial court, see *id.*, we remand for consideration of the existence of an established custodial environment, after which the trial court shall provide more express fact-finding regarding its independent determination of the best interests of the children. See *Spires*, 276 Mich App at 443.

Lastly, plaintiff asserts that the trial court erred by refusing to grant her motion for a new trial under MCR 2.611(A)(1) on the basis of newly discovered evidence and purported irregularities in the proceedings. We review for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

MCR 2.611(A)(1) states that a new trial may be granted for a number of different reasons, including "irregularity in the proceedings" and on the basis of "newly discovered evidence." MCR 2.611(A)(1)(a); MCR 2.611(A)(1)(f). However, a new trial is warranted under MCR 2.611(A)(1) only when the party's "substantial rights are materially affected." Further, for newly discovered evidence in particular to warrant a new trial, it must be material evidence and it must be such "which could not with reasonable diligence have been discovered and produced at trial." MCR 2.611(A)(1)(f). See *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).

In this case, plaintiff has not shown that the trial court abused its discretion in denying her motion for a new trial. According to her affidavit, plaintiff's attorney informed her that the Friend of the Court had shown the trial court something from Facebook and that, based on this, the trial court was prepared to rule against her. The trial court mentioned on the record that the Friend of the Court was present in court, and had provided the court with a "document." However, there is no indication, beyond the hearsay in plaintiff's affidavit, to suggest what this evidence involved, and even the hearsay in plaintiff's affidavit does not contain specifics. Given that the "evidence" is largely unknown, plaintiff has not demonstrated its materiality, and, given that it was discovered before the end of trial, plaintiff could have moved to reopen proofs and she has thus failed to show that it could not be produced at trial through the exercise of reasonable diligence. Indeed, if anything, the evidence appears to have been damaging to plaintiff's position, meaning failure to grant a new trial on the basis of this "new" evidence was hardly injurious to plaintiff's substantial rights. Ultimately, most detrimental to plaintiff's motion was the fact that, cognizant of all the facts at issue and the contents of the stipulation, plaintiff entered into the stipulation regarding custody on the advice of counsel and, in these circumstances, even assuming some irregularity in the proceedings, she has not shown how the evidence materially affected her substantial rights. Consequently the trial court did not abuse its discretion in denying her motion.

In sum, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial, and the parties' stipulation remains valid as plaintiff has not made a showing of duress to void the agreement. Nevertheless, because it is incumbent upon the trial court to make an independent assessment of the children's best interests and the trial court failed to determine the existence of an established custodial environment, which, if one exists with plaintiff would require defendant to present clear and convincing evidence that change is in the children's best interests, we vacate the trial court's order and remand for further proceedings.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ David H. Sawyer
/s/ Joel P. Hoekstra